

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

GENBAND US LLC

v.

METASWITCH NETWORKS CORP., ET
AL.

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Case No. 2:14-cv-33-JRG-RSP

ORDER ON EXHIBIT OBJECTIONS

The parties have submitted two disputes over the admissibility of exhibits at trial.

First, Genband submits an objection to DX-312, which relates to CableLabs. At the pretrial hearing, the Court overruled Genband's Fed. R. Evid. 402 and 403 objections to the CableLabs-related evidence, referred to by the parties as "Bucket D." Genband agrees that the admissibility of DX-312 is governed by the Court's ruling on the CableLabs evidence, but states its objection to preserve it for the record. Accordingly, Genband's objection is **DENIED** for the reasons set forth at the pretrial hearing.

Second, Metaswitch objects to nine exhibits¹ Genband intends to offer as evidence Metaswitch copied Genband's G9 product. Metaswitch argues this evidence is irrelevant because no Genband expert has opined that the G9 product practices the asserted patents.

Evidence of copying is a secondary indicia of non-obviousness, but the copying must bear some nexus or connection to an asserted claim. *See* (Dkt. No. 425). If Genband submits evidence at trial that the G9 practices at least one asserted claim (e.g. via the testimony of an engineer or the properly disclosed opinion of an expert), then Genband may rely on evidence that Metaswitch allegedly copied the G9. Otherwise, this evidence bears no nexus to the asserted claims and is not admissible.

¹ The exhibits are: PX0296, PX0297, PX0298, PX0329, PX0330, PX0192, PX0292, PX0293, PX0294.

Because the record is not clear at this point, these exhibits will not be preadmitted and Genband must seek leave before referring to these exhibits, which should be after it has offered evidence of the nexus referred to above. However, Genband is not restricted to its rebuttal case and may offer this evidence in its case in chief since Metaswitch has clearly put the matter at issue.

SIGNED this 10th day of January, 2016.


ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE